

Entered on Docket

July 19, 2010

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



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Signed: July 16, 2010

Leslie Tchaikovsky
LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re No. 10-44101 T
CEASAR CUEVAS RICASATA, GERALDYN
GAVIOLA RICASATA, Chapter 11

Debtors-in-Possession.

In re No. 10-45356 T
EUFRESINA DE LEON BOADO, ARTHUR
BASA BOADO, SR., Chapter 11

Debtors-in Possession.

MEMORANDUM OF DECISION

The above-chapter 11 debtors-in-possession have applied for permission to employ Kenneth R. Graham ("Graham") as their bankruptcy counsel in the above-captioned cases. The Office of the United States Trustee (the "UST") has objected to Graham's employment. The parties were given an opportunity to brief the issues. Having considered the evidence and argument presented, the Court concludes that the applications should be denied with prejudice. The

1 underlying facts and the reasons for the Court's decision are set
2 forth below.

3 **BACKGROUND**

4 Graham filed a chapter 11 petition for the Ricasatas on April
5 12, 2010. An application to employ Graham as counsel for the
6 Ricasatas was filed on May 3, 2010. An objection to the application
7 was filed on May 6, 2010. The parties appeared at hearings with
8 respect to the application and objection on May 17 and June 15, 2010.
9 At the conclusion of the June 15, 2010 hearing, the Court gave Graham
10 until June 22, 2010 to file a response to the UST's objection and the
11 UST until June 29, 2010 to file a reply. Graham failed to file a
12 response in this case. However, on June 28, 2010, the UST filed a
13 motion to extend the deadline for its reply. The motion was granted.
14 The UST filed a timely reply on July 13, 2010.

15 Graham filed a chapter 11 petition for the Boados on May 10,
16 2010. An application to employ Graham as counsel for the Boados was
17 filed on June 2, 2010. An objection to the application was filed on
18 June 11, 2010. The parties appeared at a hearing with respect to the
19 application and objection on June 15, 2010. At the conclusion of the
20 June 15, 2010 hearing, the Court gave Graham until June 22, 2010 to
21 file a response to the UST's objection and the UST until June 29,
22 2010 to file a reply. Graham filed a response in this case on June
23 25, 2010. On June 28, 2010, the UST filed a motion to extend the
24 deadline for its reply. The motion was granted. The UST filed a
25 timely reply on July 13, 2010.

1 The objection filed by the UST in the Ricasata case asserted
2 that, contrary to Cal. Civ. Code § 2944.7, Graham obtained \$6,000
3 from the Ricasatas for performing future loan modification services.
4 It also noted that Graham had failed to serve a copy of the proposed
5 order approving his employment on the UST. Finally, the objection
6 noted that the retainer agreement attached to the application
7 indicated that Graham intended to charge the Ricasatas \$200 for any
8 amendments to the petition. The UST contended that this charge was
9 excessive.

10 The objection in the Boado case asserted that the employment of
11 Graham by various debtors in the Northern District of California had
12 been the subject of numerous objections by the UST. In some of these
13 cases, his employment had been denied. In addition, various
14 bankruptcy courts in the Northern District had issued orders to show
15 cause based on complaints about his performance. Twelve cases are
16 listed and the details of the problems summarized.

17 The UST noted that all twelve of the cases were large cases in
18 which individual debtors owned multiple pieces of real estate. In
19 most of the cases, some of the real estate generated cash collateral.
20 In none of the cases were applications filed for permission to use
21 cash collateral. The UST further noted that Graham had permitted
22 another attorney to work on the Boado case without disclosing the
23 attorney's name or connections. This problem had not been remedied
24 despite the UST having brought it to Graham's attention. The UST
25 concluded by asking that Graham's employment be denied unless and
26

1 until he can demonstrate that he is sufficiently competent and
2 ethical to represent a chapter 11 debtor-in-possession.
3

4 The response filed by Graham in the Boado case asserted that his
5 office has now established a checklist to prevent the mistakes
6 previously made, as noted by the UST. He pointed out that, in some
7 of the twelve cases listed by the UST, the objections cited were
8 overruled without hearings. In one of the cases, no ruling had yet
9 been made on the objection. With respect to the attorney whose name
10 and connections were not disclosed, Graham contended that he was
11 simply an employee of Graham's firm. He contended that nothing in
12 the rules or guidelines required a law firm applying for employment
13 to identify all of its attorneys by name. Based on this response,
14 Graham asked that the UST's objection to his application be overruled
and his employment approved.

15 The UST's filed a consolidated reply in the two cases. The UST
16 continued to assert Graham's lack of competence and lack of candor
17 regarding the terms of his employment as grounds for denying approval
18 of his employment. The UST noted that the Court has a duty to deny
19 approval of the employment of counsel by chapter 11 debtors-in-
20 possession on grounds of incompetence, among other things. See In
21 re Nucorp Energy, inc., 764 F.2d 655, 658 (9th Cir. 1985); In re
22 Crayton, 192 B.R. 970, 976 (Bankr. 9th Cir. 1996); and In re Vettori,
23 217 B.R. 242 (Bankr. N.D. Ill. 1998).

24 The UST noted that Graham began filing chapter 11 cases for
25 debtors in March 2009. Since that time he has filed 19 chapter 11
26 cases. In virtually all of these cases, the debtors were individuals

1 who owned multiple rental properties. In none of these 19 cases have
2 chapter 11 plans been confirmed. Two of the cases have been
3 dismissed, one case was converted to chapter 7, and in one case
4 Graham's employment was denied. In three others, his employment
5 applications remain pending.

6 Moreover, the UST contended, the history of Graham's misconduct
7 demonstrates that he is unable or unwilling to learn from his
8 mistakes. His employment was denied in September 2009 in a San
9 Francisco bankruptcy case, based on his agreement to accept a post-
10 petition retainer without court approval. Nevertheless, Graham filed
11 employment applications containing provisions for post-petition
12 retainers in January and February 2010. Similarly, Graham has
13 repeatedly failed to comply with state law regarding the receipt of
14 loan modification fees. Despite being advised in April 2010 of the
15 prohibition on flat fees for such services, he continued to file
16 employment applications thereafter providing for such fees.

17 The UST noted that, since the objections were filed in these two
18 cases, on July 1, 2010, Graham was sanctioned by another bankruptcy
19 judge in this district for failing to timely file documentation with
20 respect to the receipt of fees for loan modification services as
21 ordered by the court. The UST conceded that it is true that a law
22 firm need not disclose the name of every member or associate when
23 applying for employment. However, it noted that here, it appeared
24 that the undisclosed attorney was the only attorney the debtors ever
25 dealt with. Moreover, the attorney was a recent admittee to the Bar
26 who did not provide the debtors with adequate legal services.

Based on the foregoing, the Court concludes that Graham's employment should not be approved in either case. A chapter 11 debtor-in-possession serves in the capacity of a trustee and thus is a fiduciary with respect to estate property. For this reason, a chapter 11 debtor must seek the Court's approval before employing counsel. The Court has an obligation under these circumstances to permit a chapter 11 debtor-in-possession to employ counsel only when his counsel of choice is competent in chapter 11 bankruptcy law and has ethical standards sufficient to his role as counsel for a fiduciary. The Court is unable to find that Graham meets these requirements. Above all, Graham's repeated noncompliance with the law, after being advised of problems, forms the basis for the Court's conclusion. Graham's employment application will be denied with prejudice.

Counsel for the UST is directed to submit proposed forms of orders in these two cases.

END OF DOCUMENT

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